No. 94-834

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

NORTH STAR STEEL COMPANY,

Petitioner,

v.

CHARLES A. THOMAS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In actions brought under the Worker Adjustment and Retraining Notification Act, should courts borrow the limitations period from the National Labor Relations Act, as opposed to state law or another federal statute, such as the Fair Labor Standards Act?

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BRIEF FOR RESPONDENTS

STATEMENT

A. Facts

Until 1991, petitioner North Star Steel Corporation ("North Star") operated a production facility in Milton, Pennsylvania, producing hot rolled steel bars and other steel products. The production employees, who were paid by the hour, were represented in collective bargaining by the United Steelworkers of America ("USWA"). The respondents in this case, by contrast, were salaried employees who were not represented by any union. Joint Appendix ("JA") 15.

On February 25, 1991, petitioner announced that all of its employees would be laid off, effective immediately, for an indefinite period. JA 15-16. None of the employees, hourly or salaried, was given any advance notice of this action. Appendix to the Petition ("Pet. App.") 17a. Petitioner refused to state how long the plant would be closed, or even whether the closure was permanent. JA 16. As a consequence, it did not give respondents the accumulated vacation and severance pay to which they would have been entitled if their lay-offs were permanent. JA 16, 18-19. Respondent Thomas, who was the purchasing manager at the Milton plant, made numerous inquiries about petitioner's plans, but received only vague and inconclusive answers. *Id.*

The USWA did not accept petitioner's claim that it was unsure how long the layoff would last, and so, on September 9, 1991, it sued in the United States District Court for the Western District of Pennsylvania, claiming that petitioner's failure to provide advance notice violated the Worker Adjustment and Retraining Notification Act ("WARN"). *USWA v. North Star Steel*, 809 F. Supp. 5, 6 (M.D. Pa. 1992), *aff'd*, 5 F.3d 39 (3d Cir. 1993). Because USWA only sued on behalf of its own members, it sought no relief for respondents. *Id.* at 7. Although that suit was filed more than six months after the unannounced closing of the plant, petitioner did not raise the statute of limitations as a defense.

Eventually, respondent Thomas began to put his inquiries in writing. JA 16-17. Meanwhile, petitioner conceded in the USWA suit that it had committed what it called a "technical" violation of WARN, and on April 9, 1992, the district court granted summary judgment against petitioner, and later determined the number of days for which it was required to pay the USWA's members. *USWA v. North Star Steel Co.*, *supra*. By letter dated May 21, 1992, petitioner promised respondent Thomas that it would make the same payments to its non-union employees as the district court decided had to be made to employees represented by the USWA. JA 19. Although petitioner continued to make

such promises, JA 20, it ultimately provided the respondents only with their accumulated vacation and severance pay. JA 13, 17. As late as August, 1992, petitioner was claiming that it had originally anticipated that the lay-off would be only temporary, and that only in that month had it decided to make the closure permanent. JA 13.

B. Proceedings Below.

Two months later, on October 23, 1992, respondents filed this action against petitioner in the Middle District of Pennsylvania, alleging that petitioner's failure to notify them violated WARN. Petitioner's answer did not deny that it had violated WARN, but did raise the statute of limitations as an affirmative defense, arguing that the six-month period of section 10(b) of the National Labor Relations Act ("NLRA") should be borrowed.[1]

On April 1, 1993, respondents moved for summary judgment on the merits, and petitioner cross-moved for summary judgment based on its statute of limitations defense. On May 25, 1993, the district court granted petitioner's motion for summary judgment. 838 F. Supp. 970. Respondents appealed to the Third Circuit, which consolidated their appeal with *USWA v. Crown, Cork & Seal Corp.*, a case presenting the same issue. Respondents argued that the court should follow the normal rule of borrowing a limitations period from state law, that the NLRA was not closely analogous to WARN, and that federal policies and the practicalities of litigation did not require a federal limitations period for WARN any more than they do for most federal

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[1] Respondents argued that petitioner's misleading statements in response to Thomas' inquiries about its plans should estop petitioner from raising a limitations defense. The district court rejected this argument, Pet. App. 24a, which was not pressed on appeal.

statutes. To the contrary, respondents pointed out, the arguments advanced by petitioner for borrowing from federal law would apply equally to most federal statutes, and so adopting petitioner's analysis would make borrowing from federal law the normal rule, rather than the exception.

In arguing against the adoption of section 10(b), respondents pointed to several more analogous limitations periods, both state and federal, under which their claims would have been timely. They argued, however, that it was unnecessary for the court to pick one of these alternatives, because the choice would not affect the outcome of the appeal, and thus would be mere dictum.

The court of appeals reversed. 32 F.3d 53 (3d Cir. 1994). It began by noting this Court's repeated holdings that, if a federal statute contains no statute of limitations, the normal rule is that courts should borrow the most closely analogous state law limitations period. *E.g.*, *Reed v. UTU*, 488 U.S. 319 (1989); *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Although there is an exception for cases where a federal limitations period "**clearly** provides a closer analogy" **and** the federal policies at stake make that rule "**significantly** more appropriate," *DelCostello*, 462 U.S. at 172 (emphasis added), this exception is "closely circumscribed." *Reed*, 488 U.S. at 324, *quoted* Pet. App. 6a. The court also noted this Court's expression of distress in *Reed* that many lower federal courts had failed "to take seriously our admonition" that borrowing from state law is the norm, and that using a federal statute is the rare exception, "in labor law as elsewhere." *Id.*

Based on that standard, the court found no sound argument for borrowing from federal law. Although WARN cases and NLRA claims have some features in common, the purposes, procedures, rights and remedies of the two statutes are quite different. *Id.* 7a-11a. Nor were there serious reasons to believe that the interest in uniform characterization of federal statutes that encompass a broad variety of claims

and legal theories provided a basis for borrowing from federal law, as in the case of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc's*, 483 U.S. 143 (1987). *See also Wilson v. Garcia*, 471 U.S. 261 (1985) (borrowing the same state period to govern all section 1983 claims). Pet. App. 12a-13a. Finally, the court noted that an unduly short limitations period might well frustrate the ability of affected workers to bring claims. *Id.* 14a-15a.

For all these reasons, the court of appeals held that a state limitations period, rather than section 10(b), should be borrowed, and accordingly it reversed the dismissal of respondents' claims. In rejecting petitioner's contention that section 10(b) ought to be borrowed to govern WARN, the court of appeals declined to decide which limitations period should be borrowed, because the actions would be timely under any of the possibilities that had been brought to its attention, and because petitioner had not identified any other limitations period under which the action would be untimely. *Id.* 15a.

SUMMARY OF ARGUMENT

As a general rule, the limitations period for a federal cause of action is borrowed from the most closely analogous state law. In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court applied what it characterized as a "narrow exception" to this general rule for the federal "hybrid" action to enforce rights under collective bargaining agreements ("CBAs") when a union violates its duty of fair representation ("DFR"), which is implied by the NLRA. The Court decided that, because the prompt resolution of disputes involving CBAs helps maintain labor peace, a short limitations period was required to allow the bargaining parties to be certain that their resolutions of such disputes were, in fact, final. Accordingly, it ruled that the six months allowed by section 10(b) of the NLRA for filing unfair labor practice ("ULP") charges would be borrowed for DFR suits. The

Court emphasized, however, both in *DelCostello* and in later cases, such as *Reed v. UTU*, 488 U.S. 319 (1989), that the borrowing of state limitations period was to remain the norm, for labor law as well as other federal claims.

This general rule, and not the narrow exception, applies to WARN claims. To be sure, most labor law claims could be said to have some connection to bargaining disputes. But if the result in *DelCostello* is to remain an exception rather than become the rule, the application of section 10(b) must be confined to claims which carry the same direct and immediate threat to the finality of bargaining compromises that DFR claims do.

WARN claims are not analogous to the NLRA; they are even less analogous to the NLRA than, say, claims under 42 U.S.C. §§ 1981 and 1983 are to claims under the Civil Rights Act of 1964. *See Wilson v. Garcia*, 471 U.S. 261 (1985). And WARN claims are just as analogous to state law claims in contract, to Pennsylvania's Wage Collection Statute, or to its residual limitations period as are claims under 42 U.S.C. §§ 1981 and 1983 to general personal injury claims. Thus, WARN does not qualify for federal borrowing under the first prong of the *DelCostello* test.

Nor do WARN claims threaten the finality of grievance decisions, as do DFR claims, which are based on workers' economic rights as members of a bargaining unit represented by a union. WARN claims, by contrast, are founded on employees' statutory rights, independent of any contract, even a CBA. Indeed, only 10% of all employees protected by WARN are even represented by unions; most such employees are unrepresented, as are respondents here. Moreover, the adoption of a short statute of limitations threatens the remedial objectives of WARN, and, given the tenuous connection between WARN claims and bargaining compromises, there is no countervailing justification for endangering the ability of workers to protect their rights, unlike the need for finality in DFR actions.

Instead of trying to argue that WARN requires the borrowing of a federal limitations period under the standard set in *DelCostello*, *Reed* and elsewhere, petitioners ask for the adoption of a different standard. Petitioner North Star does this openly in the last section of its brief, but both petitioners do so throughout their briefs by recasting the *DelCostello* test as one that gives federal limitations periods at least an equal status with state periods. Indeed, petitioners place so much emphasis on the need for a limitations period whose duration is the same in every state, that their test covertly creates a strong presumption in favor of federal borrowing. But the arguments that petitioners advance for reversing 165 years of precedent favoring state law borrowing are unconvincing, and adoption of their proposed test would effectively reopen the question of the proper limitations period for every federal statute. The litigation over this question would produce the very unpredictability and increased litigation costs that petitioners advance as the reason for adopting their proposed rule.

Under the general rule of borrowing from state law, either the three-year limitations period for enforcing claims under Pennsylvania's Wage Payment Collection Law, or the four-year period for suing under either an express contract, not in writing, or a contract implied in law, is the most analogous state period. Even if the Court chooses to borrow a federal limitations period, the two and three year limitations period for filing wage claims under the Fair Labor Standards Act provides a better balance between employers' interest in repose and workers' interest in protecting rights that Congress has granted them. Indeed, if the Court is persuaded by petitioner North Star's appeal to the supposed Congressional intent behind the new four-year residual limitations period as a reason to abandon the traditional preference for state law borrowing, it should borrow that new limitations period to govern WARN.

ARGUMENT

I. UNDER *DELCOSTELLO* AND ITS PROGENY, THE GENERAL RULE, "IN LABOR LAW AND ELSEWHERE," REQUIRES THE BORROWING OF STATE LIMITATIONS PERIODS, SUBJECT TO A "NARROW EXCEPTION" WHEN A "COMPELLING" CASE CAN BE MADE TO BORROW A FEDERAL PERIOD INSTEAD.

With some exceptions, federal statutes do not contain their own limitations periods; rather, they must be borrowed from other sources. At least since *M'Cluny v. Silliman*, 3 Peters 270, 277 (1830), this Court has repeatedly declared that, as a general rule, courts should apply the most closely analogous state statute of limitations.[2] Some of the early decisions indicated that this rule was compelled by the Rules of Decision Act, 28 U.S.C. § 1652. *See id.* at 277; *see also Campbell v. City of Haverhill*, 155 U.S. 610, 615 (1895) (Rules of Decision Act gives courts discretion to refuse to apply state limitations periods that allow insufficient time to sue). However, at least since *Holmberg v. Ambrecht*, 327 U.S. 392, 395 (1946), the Court has treated "the implied absorption of State statutes of limitation within the interstices of federal enactments [as] a phase of fashioning remedial details where Congress has not spoken but left matters for

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[2] *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975); *Runyon v. McCrary*, 427 U.S. 160, 180 (1976), *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-705 (1966); *Cope v. Anderson*, 331 U.S. 461, 463-464 (1947); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *O'Sullivan v. Felix*, 233 U.S. 318, 322 (1914); *Campbell v. City of Haverhill*, 155 U.S. 610, 619-620 (1895).

judicial determination within the general framework of familiar legal principles."[3]

The selection of which state statute of limitations to borrow sometimes presents a difficult issue of characterization, because federal statutes frequently create rights for which there is no exact state parallel. The Court has made clear, however, that mere difficulty of characterizing the federal law is not a sufficient reason to abandon the effort. *DelCostello v. Teamsters*, 462 U.S. 151, 171 (1983); *Wilson v. Garcia*, 471 U.S. 261, 272 (1985).

There is a narrow exception to the general rule where the use of analogous state statutes would frustrate the implementation of national policies. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). As the Court held in *DelCostello*, the "hybrid" action against a union and an employer is one example. In order to place in context the reasons why the Court found it necessary to make an exception in such cases, it is important to explain the precise role which "hybrid" actions play in federal labor law, and then how they differ from WARN cases.

Individual employees, as well as their unions, may sue under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, to enforce rights conferred on them by CBAs between their employers and their unions. *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962). But the Court has erected a significant procedural barrier to prevent the courts from being inundated with suits to enforce CBAs — the plaintiff must exhaust contractual grievance procedures, including arbitration, before suit is filed. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). It has also erected a major substantive barrier to such suits — the courts

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[3] Petitioner North Star thus errs in asserting that this analytic development is "recent", Br. at 10, *citing DelCostello*, and implying that, because the change is so recent, it warrants further changes in the governing standard. *Id.* 32-33.

will not overturn arbitral awards unless the award cannot be justified as having drawn its essence from the CBA. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Court has also recognized, however, that employees may be prevented from exhausting the contractual procedures, or may be unable to obtain a fair hearing in arbitration, if the union breaches its DFR either in deciding not to pursue the contractual procedures or in the way it conducts them. Accordingly, the Court has ruled that individual employees seeking to enforce their rights under a CBA will be excused from the exhaustion requirement, and from the highly deferential standard of review under *Enterprise Wheel*, if, but only if, they can show that the union breached its DFR in handling the grievance. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). A lawsuit in which employees seek to enforce both the CBA against the employer, and the DFR against the union, is known as a "hybrid" DFR action.

The issue of the proper limitation period for hybrid actions first reached the Court in *UPS v. Mitchell*, 451 U.S. 56 (1981). In *Mitchell*, the narrow question on which certiorari was granted was which state statute was the most analogous for post-arbitration hybrid suits against employers alone. *Id.* at 61-62. In choosing to borrow the limitations period for suits to vacate arbitration awards, the Court relied on the fact that, absent a fairly short limitations period, the parties to the CBA could not be sure that an arbitrator's resolution of a dispute under the agreement was final. Therefore, the Court rejected state limitations periods for enforcing contractual rights because they allowed too long a period in which the arbitrator's disposition of a grievance was in question, and their use would frustrate federal policy favoring prompt resolution of collective bargaining disputes. *Id.* at 63-64.

Two years later, in *DelCostello*, the issue was whether to apply a federal limitations period, instead of any of the state alternatives, in hybrid suits against both an employer and a union. The Court reiterated its concern that several of the analogous state limitations periods, such as actions for tortious injury or for professional malpractice, were so lengthy that employer-union disputes, and the compromises by which they were resolved (including negotiated terms, settled grievances, or even arbitral adjudications), could remain in limbo for years, and thus could endanger stability in labor relations and, in the long run, labor peace. 462 U.S. at 168-169. The other most analogous state statutes, such as those governing actions to vacate arbitration awards, were so short — generally three months — that aggrieved employees would not have enough time to file suit. *Id.* at 165-168 (undue brevity was "most serious objection" to state-law borrowing). Moreover, the Court recognized that the most analogous state statutes were different for the employer and for the union, and if each were applied to their respective defendant, the result would be the application of different limitations periods to two parties to the same suit, which would clearly have been undesirable. *Id.* at 169 n.19.

Still, the Court said, "[t]hese objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." *Id.* at 169. However, it found that section 10(b) of the NLRA was significantly more appropriate than any of the state analogies, both because Congress had designed it to accommodate a "very similar balance of interests", *i.e.*, employee rights versus the stability of private adjustment of labor disputes, and because the DFR cause of action was itself implied from the NLRA. *Id.* at 169-171.

The Court carefully emphasized the narrowness of its holding, however, and admonished that courts should not decline to adopt state limitation periods simply because state law fails to provide a perfect analogy:

> We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, **in labor law or elsewhere**. . . . [R]esort to state law remains the norm for borrowing of limitations periods [unless] a rule from elsewhere in federal law **clearly** provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make the rule a **significantly more appropriate** vehicle . . ..

Id. at 171-172 (emphasis added).

As a result of these limits, the only other labor law suits to which lower courts consistently agree to extend section 10(b) are DFR suits against unions and employers who are covered by the Railway Labor Act ("RLA") rather than the NLRA. According to these courts, such cases are so similar to NLRA hybrid actions that *DelCostello*'s reasoning requires the borrowing of a federal limitations period in such cases as well. *E.g.*, *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984).[4]

The predominant trend for non-DFR labor cases, however, is illustrated by *Reed v. UTU*, 488 U.S. 319 (1989), where the Court borrowed state limitations periods to govern claims under the Union Members' Bill of Rights,

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[4] This Court has not yet decided whether it is appropriate to borrow a federal limitations period for hybrid suits under the RLA, and, if so, whether the proper federal period for borrowing is the NLRA's six-month limitations period or the RLA's own two-year limitations period, 45 U.S.C. § 153, First (r). Contrary to the implication in petitioner North Star's brief, at 11, this Court did not decide that question in *West v. Conrail*, 481 U.S. 35 (1987). Both parties assumed the applicability of section 10(b), as did the Question Presented, and this Court found it unnecessary to address that issue. *Id.* at 38 n.2.

Title I of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). The Court refused to borrow the six-month period of section 10(b), even though intra-union disputes will sometimes affect collective bargaining disputes, because the latter sort of disputes were often not involved at all, and even when they were involved, LMRDA cases would have

> substantially less immediate and less significant an impact on bargaining and private dispute settlement than that which led us to apply the § 10(b) statute to hybrid § 301/fair representation claims, which directly challenge both the employer's adherence to the collective bargaining agreement and the union's representation of the employee in grievance-and-arbitration procedures.

Id. at 331.

Moreover, the Court noted, the LMRDA was enacted because Congress was dissatisfied with the NLRA's protection of the union member interests that the LMRDA was intended to safeguard. And, most important, the lower court in *Reed* had "fail[ed] to take seriously our admonition that analogous state statutes of limitations are to be used unless they frustrate or significantly interfere with federal policies," *id.* at 327, for which a "compelling demonstration" is required. *Id.* *See also Lampf, Pleva, Lipkind v. Gilbertson*, 501 U.S. 350, 356 (1991) (stressing that "state-borrowing doctrine may not be lightly abandoned [and] federal borrowing [i]s 'a closely circumscribed exception'"). As the Court further emphasized,

> This is a narrow exception to the general rule. As we made clear in *DelCostello*, "in labor law or elsewhere," application of a federal statute will be unusual, and "resort to state law remains the norm for borrowing of limitations periods."

> *Reed*, 488 U.S. at 324, *quoting DelCostello*, 462 U.S. at 171.

Remarkably, even though *Reed* is this Court's only decision since *DelCostello* to address the propriety of borrowing section 10(b) to govern a federal labor claim, and although it is the only decision of this Court containing an extended discussion of the meaning of *DelCostello*, neither petitioner discusses *Reed*, nor even cites it for more than a general proposition or for its narrow holding.

Moreover, the limitations periods in employment discrimination cases have been borrowed from state law, *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975), despite the fact that such suits frequently call into question matters which had been resolved between unions and employers. *Id.*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII case). The lower courts continue to apply state limitations periods in suits under 42 U.S.C. § 1981, even against unionized employers, relying on the general rule discussed in *DelCostello*. *E.g.*, *Howard v. Roadway Express*, 726 F.2d 1529, 1531 (11th Cir. 1984); *see also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (suit against union alleging discriminatory grievance handling).

North Star asserts in its brief that section 10(b) "has been applied to claims under other federal labor laws," North Star Br. 11, apparently seeking to convey the sense that courts have generally abandoned the rule of borrowing from state law in labor law cases. This proposition is supported by a highly selective citation of precedent, because the vast majority of appellate cases in the labor law area, particularly since *Reed*, have continued to borrow limitations periods from state law outside the DFR area.

For example, in suits to enforce the NLRA's secondary boycott provisions under section 303 of the LMRA, 29 U.S.C. § 187, no court of appeals applies the six-month period of section 10(b). Instead, all apply longer state

limitations periods, even though labor-management relations are directly affected by such suits, and a secondary boycott, like a breach of the DFR, is a ULP that is governed by the express six-month limitations period for filing charges with the National Labor Relations Board ("NLRB"). Even though the case for borrowing section 10(b) is far more compelling for cases under section 303 than for WARN cases, these courts conclude that the effect of such litigation on stable labor-management relations, and consequently on labor peace, is insufficient to warrant a departure from the normal rule of borrowing analogous state limitations periods.[5]

Similarly, courts of appeals generally hold that claims under ERISA are governed by state limitations periods, not by section 10(b).[6] They apply this rule even when the claim implicates collective-bargaining disputes.[7] And suits to enforce union constitutions under section 301 of the LMRA are usually governed by state limitations periods, although courts sometimes borrow section 10(b) if the claim is parallel to a

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[5] *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (2d Cir. 1985); *Carruthers Ready-Mix v. Cement Masons Local 520*, 779 F.2d 320, 325-328 (6th Cir. 1985); *Prater v. UMW*, 793 F.2d 1201, 1209-1210 (11th Cir. 1986).

[6] *E.g.*, *Felton v. Unisource Corp.*, 940 F.2d 503, 510-513 (9th Cir. 1991); *Held v. Manufacturers Hanover Leas. Corp.*, 912 F.2d 1197, 1200-1202 (10th Cir. 1990).

[7] *E.g.*, *Adams v. Gould, Inc.*, 739 F.2d 858 (3d Cir. 1984) (enforcing collectively bargained pension rights); *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 167 (2d Cir. 1984) (enforcing plan against employer that sought to withdraw from multi-employer unit); *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52 (3d Cir. 1985) (seeking pension benefits for strikers); *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987) (claim that plant closing was intended to prevent union members from exercising pension rights).

DFR claim.[8] Even LMRDA cases challenging the ratification of CBAs, the one type of claim on which this Court reserved judgment in *Reed*, 488 U.S. at 331-332 n.6, are now held to be governed by state limitations periods.[9] Indeed, even the two non-DFR examples chosen by petitioner North Star to support its assertion that section 10(b) "has been borrowed" do not represent the majority view of the lower courts with respect to the statutes involved in those cases.[10]

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[8] *E.g.*, *Brenner v. Carpenters Local 514*, 927 F.2d 1283, 1292-1295 (3d Cir. 1991); *Pruitt v. Carpenters Local 225*, 893 F.2d 1216, 1219-1221 (11th Cir. 1990).

[9] Since *Reed*, the courts of appeals have unanimously applied state limitations periods in that situation, even those that had held to the contrary before *Reed*. *Marshall v. Brewers Local 6*, 960 F.2d 1360, 1366-1367 (8th Cir. 1992); *Allgood v. Elyria United Methodist Home*, 904 F.2d 373, 377-378, *reh. granted and app. dism. in part on other grounds*, 913 F.2d 1159 (6th Cir. 1990) (overruling circuit precedent); *Clift v. UAW*, 881 F.2d 408, 412 (7th Cir. 1989) (overruling circuit precedent).

[10] Thus, unlike *Haggerty v. USAir*, 952 F.2d 781 (3d Cir. 1992), most courts borrow state limitations periods to govern the Employee Protection Program of the Airline Deregulation Act. *Bowdry v. United Air Lines*, 956 F.2d 999, 1005 (10th Cir. 1992); *Gonzalez v. Aloha Airlines*, 940 F.2d 1312, 1315 (9th Cir. 1991); *McDonald v. Piedmont Airlines*, 930 F.2d 220, 224-225 (2d Cir. 1991). And although *Aluminum Workers Local 674 v. A.P. Green Refractories*, 895 F.2d 1053 (5th Cir. 1990), applied section 10(b) to a "pure" action under section 301 of the LMRA between a union and an employer, this Court, in a pre-*DelCostello* decision, borrowed state law to govern such an action in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), as many lower courts have done, especially in their post-*Reed* decisions. *E.g.*, *ILA Local 953 v. Cataneo, Inc.*, 990 F.2d 794, 800 (4th Cir. 1993); *SEIU Local*

(continued...)

Thus, the lower courts continue to follow this Court's mandate, in labor law and elsewhere, by borrowing state limitations periods to govern most claims, and federal borrowing remains the rare exception.

II. NORTH STAR HAS NOT MADE THE "COMPELLING DEMONSTRATION" NEEDED TO SUPPORT BORROWING A LIMITATIONS PERIOD FROM FEDERAL RATHER THAN STATE LAW.

Petitioners contend that WARN warrants an exception to the general rule because, they say, the NLRA is more analogous to WARN than any state statute, and the failure to adopt a uniform federal limitations period may harm WARN's policy objectives. Two courts of appeals, joined by all district courts in circuits where the issue remains open, have borrowed state law.[11] The Sixth Circuit adopted

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[10](...continued)
36 v. City Cleaning Co., 982 F.2d 89, 95 (3d Cir. 1992); *Paperworkers Local 395 v. ITT Rayonier*, 931 F.2d 832, 838 (11th Cir. 1991); *Elevator Constructors v. Home Elevator Co.*, 798 F.2d 222, 224-229 (7th Cir. 1986). Courts are more likely to apply section 10(b) where the section 301 action is brought to compel arbitration. *E.g.*, *Teamsters Local 315 v. Great Western Chem. Co.*, 781 F.2d 764, 769 (9th Cir. 1986).

[11] *Thomas v. North Star Steel Co.*, 32 F.3d 53 (3d Cir. 1994); *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993); *Frymire v. Ampex Corp.*, 821 F. Supp. 651 (D. Colo. 1993); *Machinists Local 701 v. Santa Fe Terminal Serv.*, 8 IER Cases 897, 1993 U.S. Dist. LEXIS 5859 (N.D. Ill. 1993); *Teamsters Local 63 v. Santa Fe Terminal Serv.*, 8 IER Cases 778, 1993 U.S. Dist. LEXIS 8923 (C.D. Calif. 1993).

section 10(b), as did a divided panel of the Fifth Circuit, which then, *sua sponte*, granted rehearing en banc.[12]

As we now show, the reasons given by petitioners do not warrant a departure from the general rule of borrowing from state law. Indeed, petitioners are able to argue for the result they favor only by so distorting the test as to create a preference for borrowing from federal law that would govern virtually every federal statute.

A. Petitioners' Arguments Would Eviscerate the Presumption in Favor of Borrowing Limitations Periods from State Law.

Petitioners can mount a superficially cohesive assault on the decision below only by failing to take seriously this Court's admonitions in *DelCostello* and *Reed* that state law borrowing remains the norm, and that federal borrowing is the "closely circumscribed" exception, 488 U.S. at 324, that must be justified by a "compelling demonstration" that federal policies so require. *Id.* at 627.

For example, on the first prong of the exception, petitioners characterize state law borrowing as only a "fall-back" position, and repeatedly assert that section 10(b) provides a "closer" analogy than various state limitation periods, or is "closest" or "most analogous." North Star Br. 25, 26, *see also* caption 18; Crown, Cork Br. 5, 7, 11, 25, *see also* captions 8, 11; Chamber Br. 8, 9, 12, *see also* caption 6. Petitioners never try to show, as they must, that the NLRA provides a claim that is "clearly" closer to the WARN cause of action than any state law category of claims. At most, they simply place all of the possible analogies in a pot and try to show that none of the state analogies is perfect

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[12] *UMW v. Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994); *Halkias v. General Dynamics Corp.*, 31 F.3d 224, *reh. granted*, 31 F.3d 248 (5th Cir. 1994).

and that the NLRA is closer than any alternative. Crown, Cork Br. 21-25. But if this were the test, there would no longer be any presumption in favor of borrowing from state law, let alone the strong one established by this Court.[13]

Similarly, in applying the second prong of the test, petitioners' arguments would, if accepted, obliterate the general rule and require that limitations period always be borrowed from federal law. For example, they argue that, unless a single limitations period is used, employers that operate in several different states could be inconvenienced in making nationwide decisions that could lead to layoffs in several different states. North Star Br. 15-18; Crown, Cork Br. at 30-32; Chamber Br. 12-15. As North Star concedes, Br. 13 n.4, this aspect of uniformity would require federal borrowing in all but the most "limited circumstances" because federal laws almost always apply to national entities that operate in different states. The states regularly differ in the amount of time they allow for bringing the same type of claim, and yet state statutes of limitations are routinely borrowed for federal claims against defendants that operate in more than one jurisdiction.

Only federal limitations periods can ensure that claims under a particular federal statute always expire in the same amount of time regardless of the jurisdiction in which the violation was committed or in which the parties live. But such a strong presumption in the direction of borrowing from federal law would stand on its head the repeated statements by this Court, in labor law as in other areas of the law, that borrowing from state law is the norm, and borrowing from federal law the rare exception. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971) (federal limitations period justified "only when the need for uniformity is particularly

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[13] Petitioner North Star's brief does not even bother to analyze state law alternatives; it simply states that their lack of appropriateness is "self-evident." Br. 26.

great"). Petitioners' "uniformity" argument does not serve to distinguish the WARN cause of action from most federal causes of action, or to show why this case warrants the application of the exception rather than the general rule. It is, at best, an argument for changing the presumption, which should be presented to Congress. *See also* pages 43 to 46, *infra* (replying to argument that Court should overrule presumption).

In addition, the statutes at issue in *Reed* and *Hoosier Cardinal* — the LMRDA and section 301 of the LMRA — applied to many defendants that operated in more than one state, but that did not prevent the Court from following the normal federal rule by borrowing from state law. In this day and age, large companies that operate in multiple locations have learned to adapt to the different substantive and procedural requirements of the jurisdictions in which they do business.

To the extent that some companies regulated by WARN may have to take different limitations periods into account in assessing their contingent liabilities and deciding how long to keep their records, it is hard to imagine that the application of the normal rule of borrowing state limitations periods will have any significant impact on those companies' operations, especially because plant closings are not a daily occurrence in any business.

To support their argument that "uniformity" is a central consideration in borrowing decisions, petitioners rely largely on the majority opinion in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143 (1987). But the "uniformity" with which the Court was concerned there was not uniformity in length of time, but uniformity in characterization of the cause of action. Thus, in *Malley-Duff*, the Court was impelled to use a federal limitations period for RICO because RICO "encompass[es] numerous and diverse topics and subtopics," which, depending on the precise claim, might be analogous to at least nine different state causes of action. *Id.*

at 149. In that situation, so much time and energy might be spent litigating limitations questions, with the Court unable to answer such questions for all RICO cases with a single ruling, that the practicalities of litigation required the adoption of a single federal period to govern all possible actions under that statute. *Id.* at 150. *Accord*, *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (choosing a uniform characterization under state law, but not a uniform amount of time, for section 1983 claims). That argument does not apply to WARN because it contains only one type of claim — for damages for failure to provide sufficient notification.

Petitioners also cite *Lampf, Pleva, Lipkind v. Gilbertson*, 501 U.S. 350 (1991), to support their argument giving primacy to borrowing statutes that make the amount of time in which to sue the same in every state. But the part of the *Lampf* opinion containing such language, 501 U.S. at 357, drew the support of only a minority of the Court.[14] *Lampf*'s holding is that, when a cause of action is inferred from a federal statute that also contains an express cause of action and an express limitations period, the courts must look first to that statute and, indeed, the inquiry should normally end there. *Id.* at 359. Because this is the part of *Lampf* that was joined by a majority of the Court, because this analysis would explain *DelCostello* as well (the DFR having been inferred from the NLRA), and because under petitioners' reading *Lampf* would *sub silentio* have overruled 165 years of precedent making state statutes the primary source for borrowing, *Lampf* should be read as limited to statutes, like the securities laws and the NLRA, that create both inferred and express causes of action.

In addition, petitioners' "practicalities of litigation" argument is replete with lamentations about the possibility

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[14] Contrary to North Star's brief, at 12, the dissenting opinions of Justices O'Connor and Kennedy do not suggest that they agreed with this part of the opinion.

that, under a two or three year statute of limitations, evidence may disappear, potential plaintiffs may be harder to find to pay them their damages, parties may be harder to serve, and the like. Again, even assuming that this is a serious problem — and we explain below why it is not — it affects most federal causes of action to which the *DelCostello* presumption nevertheless applies. No doubt, all defendants would like to have the benefit of a six-month limitations period because it protects them sooner against allegations of unlawful conduct and reduces their record-keeping needs, but invocation of this concern does not help distinguish between those federal causes of action that ought to follow the normal rule of borrowing from state law, and those which ought to be brought within the exception.

Indeed, only two "practicalities" have been held by this Court to warrant departure from the normal rule of borrowing from state law — the prospect of lengthy wrangling over the proper limitations periods for federal statutes that include a wide variety of causes of action (as in the case of RICO), and the danger of interference with the administration of CBAs (as in the case of hybrid DFR actions). Because petitioners do not, and cannot, contend that either danger is present here, that is sufficient to warrant rejection of their arguments for borrowing from federal law.

Finally, petitioners suggest that the Court should borrow the six-month limitations period because some federal labor statutes have express six-month periods. North Star Br. 27-28; Crown Cork Br. 27-28. *See also* Chamber Br. 16. As we explain *infra* at 32-33, this argument is predicated on a highly selective and unrepresentative citation of express limitations periods among federal employment statutes. But the biggest flaw in the argument is that it ignores this Court's admonition that the principle of borrowing from state law remains the norm, "in labor law as elsewhere." If petitioners desire a uniform six-month statute of limitations for labor cases, they must ask Congress, not this Court, to create one.

B. The NLRA Is Not Analogous to WARN.

1. Different Purposes. Petitioners contend that WARN's purpose is comparable to that of the NLRA, thus warranting the borrowing of the NLRA's six-month limitations period. In fact, the purposes of the two laws are quite different. The purposes of the NLRA are well-described in its preamble: to achieve long-term industrial peace, and prevent disputes between labor and management from becoming so serious as to cause constant industrial warfare, by encouraging workers to choose unions to represent them in collective bargaining, and by requiring employers to bargain in good faith with the workers' chosen representative. 29 U.S.C. §§ 141(b), 151. The method chosen by Congress was not to set minimum employment standards, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-756 (1985); indeed, the NLRB is forbidden to require the parties to agree to any particular set of terms and conditions of employment. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Instead, Congress' strategy in the NLRA was to encourage the practice of collective bargaining, *id.*, and to prevent all parties from acting in ways that are inconsistent with such bargaining. *Emporium Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975).

WARN, by contrast, promulgates a substantive standard of conduct for employers, and grants rights to all employees, regardless of whether they join a union or engage in collective bargaining. Under the Act, before employees suffer an employment loss from the closing of an entire plant, or the layoff of a substantial number of workers at a plant, they are entitled to notice of the proposed action. As explained in the Labor Department's implementing regulations, WARN

> provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closing and mass layoffs.

20 C.F.R. § 639.1 (1993).

Because it is a minimum labor standard, rather than a pro-collective bargaining statute, it makes no sense to borrow a limitations period that was intended to govern claims relating to the bargaining process and labor relations.

This Court has specifically invoked that difference in recognizing the distinction between the purposes of plant closing statutes and of the NLRA. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the issue was whether the NLRA preempted a Maine statute, comparable to WARN, that required employers to give prior notice of plant closings. The Court ruled that "the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining," *id.* at 20, and thus held that the NLRA, being directed at a different purpose than the state law, did not preempt the Maine statute.

Moreover, as the court pointed out in *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51 (2d Cir. 1993), far from being solely a labor statute, as the NLRA is, WARN protects communities as well as workers. As the Act's sponsors recognized, both communities and workers pay a heavy price for the dislocation that follows a surprise plant closing, as taxpayer expenses for unemployment compensation and welfare mount, and workers lose their ability to spend money at community businesses and to pay their mortgages to community financial institutions. *See* 134 Cong. Rec. 15514 (Sen. Byrd), 16690-16691 (Sen. Warner). That is why WARN requires employers to give notice to the chief officer of the affected unit of local government, as well as to the state's dislocated worker agency, 29 U.S.C. § 2102(a)(2), and gives local governments a right to receive $500 for each day that notice is withheld. 29 U.S.C. § 2104(a)(3). Indeed, the statutory provision under which respondents sued here is the very one that entitles local governments to sue, 29 U.S.C. § 2104(a)(5). It is evident that the cause of action for local governments bears no

resemblance to the NLRA, so that there would be no justification for making **them** sue within six months. Nor is it likely that Congress intended the same cause of action to have one limitations period borrowed from federal law, and another from state law, depending on whether the plaintiff was a worker or a municipality. *Cf. DelCostello v. Teamsters*, 462 U.S. 151, 169 n.19 (1983) (refusing to use analogies that would result in different limitations periods against different defendants). For this reason as well, the NLRA is not an analogous statute from which the statute of limitations should be borrowed.[15]

Petitioner Crown, Cork also quotes from committee reports to support its argument that WARN's notification requirement was intended to affect collective bargaining over plant closings. Br. 17. This legislative history analysis is highly distorted. As Crown, Cork acknowledges, a bargaining requirement was included in an early bill, but was deleted in order to secure passage. When the House Report was written, the bill still required employers both to bargain with unions over plant-closings and to provide unions with detailed information about the reasons for the closing (which, in turn, the union might have used to bargain for alternatives

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[15] In arguing that WARN and the NLRA have the same purpose, petitioners invoke a reference in the NLRA's preamble to benefits that the community receives from the proscription of certain managerial practices. *E.g.*, North Star Br. at 19. We do not doubt that every labor statute is intended by Congress to benefit the community as a whole, but to compare purposes at that level of generality is simply to trivialize this aspect of the test. Similarly, North Star's assertion, Br. at 22-23, that the purposes of the statutes are similar in that both affect labor-management relations, shows only that both are labor laws. This argument does not serve to distinguish WARN from most federal labor laws (such as those in *Reed*), and so is inconsistent with this Court's insistence that state law borrowing is the norm "in labor law as elsewhere."

to the closing). Crown, Cork's blocked quotation, supposedly about the purpose of "prenotification," actually begins the section of the House Report captioned "THE DUTY TO CONSULT," H.R. Rep. 285, 100th Cong., 1st Sess. 32 (1987), which, as noted, was never enacted.

Similarly, the Senate Report quoted by Crown, Cork supported a version of the bill from which the duty to consult had been eliminated, but which still contained the duty to provide information to the union. S. 538, Section 333, 100th Cong., 1st Sess. (1987). But this section was also deleted from the bill in order to secure passage, and the Act that remained had neither of the provisions to which these reports referred as encouraging bargaining.[16]

In further support of its argument that WARN is analogous to the NLRA, petitioners rely on the fact that some WARN provisions make express reference to the NLRA. But many of the provisions they cite simply confirm how disparate the two laws are, because they show the lengths to which Congress went to keep WARN from having any impact on the collective bargaining process that the NLRA is intended to foster. *E.g.*, 29 U.S.C. § 2103(2) (WARN does not cover economic action protected by NLRA); 29 U.S.C.

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[16] Petitioner North Star cites Senator Hatch's assertion that WARN was, in effect, an amendment to the NLRA, to show that WARN is analogous to the NLRA. Br. at 21, *citing* 134 Cong. Rec. 15923, 15924 (1988). North Star neglects to mention that Senator Hatch voted against WARN, *see* 134 Cong. Rec. 16691 (1988), and that the speech that North Star quotes was given in support of the unsuccessful Kassebaum amendment, which would have eliminated its application to layoffs. 134 Cong. Rec. 16020-16021. The theme that WARN amended the NLRA was a constant one in Senator Hatch's arguments against the bill, *see* 134 Cong. Rec. 15763, 15764 (1988), but he failed to persuade a majority of the Senate of this point. It is a cardinal rule of statutory construction that statements by a bill's opponents are accorded little weight. *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988).

§ 2108 (giving notice under WARN cannot violate NLRA). Other provisions simply incorporate into WARN the definitions used by the NLRA for basic terms. *E.g.*, 29 U.S.C. § 2101(a)(4).

Moreover, as *amicus* Chamber of Commerce concedes, Br. 9-10 n.8, many labor statutes, including the LMRDA and the Age Discrimination in Employment Act, incorporate NLRA definitions and are to some extent interpreted *in pari materia* with it. *E.g.*, *Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719, 722 (5th Cir. 1971) (invoking NLRB precedents to decide whether LMRDA lets union impose fines for dual unionism). And yet in *Reed*, the Court applied the normal rule of borrowing from state law to the LMRDA, expressly rejecting borrowing from the NLRA. Thus, the fact that some WARN provisions refer to the NLRA does not support the conclusion that the NLRA is clearly more analogous to WARN than any state cause of action.

2. Different Procedures. In *Malley-Duff*, the Court relied in part on the strong similarity between the enforcement procedures of RICO and the Clayton Act in ruling that the two were closely analogous. WARN, of course, must be enforced by a private lawsuit in district court, unlike the NLRA where a private party need only file a charge form, in very general language, asking the NLRB's General Counsel to pursue an administrative complaint on his behalf. Although this difference was not enough to preclude borrowing section 10(b) in *DelCostello*, where the other reasons for borrowing federal law were so compelling, this difference in procedures surely militates against the conclusion that the two claims are so analogous that Congress must have intended that the Court depart from the normal rule of borrowing state law.

3. Different Causes of Action. Petitioners argue that WARN is analogous to section 8(a)(5) of the NLRA, which requires employers to bargain in good faith with the union representing its employees. Although WARN does not

include any duty to bargain, petitioners seize on the fact that one item about which employers must sometimes bargain is the effects of a plant closure (or, depending on the text of the collective bargaining agreement, over the closure decision itself). *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981); *Milwaukee Spring*, 268 NLRB 601 (1984), *enf'd sub nom. UAW Local 547 v. NLRB*, 765 F.2d 175 (D.C. Cir. 1985). This duty, in turn, requires the employer to inform the union of its plans in sufficient time to permit meaningful bargaining. *Gar Wood-Detroit Truck Equipment*, 274 NLRB 113 (1985).

What this argument ignores — apart from the major differences between the NLRA duty and WARN's requirements — is that such a duty exists **only** when the workers are represented by a union and the duty has not been waived by the union. The reason for this limitation is that the duty to bargain is owed only to a union, and not to individual employees. 29 U.S.C. § 158(a)(5). But only 11.5% of all private sector employees are union members. Bureau of National Affairs, *Proportion of Union Membership Hits 15.8%* [including public employees], 142 Labor Relations Reporter 180, 181 (February 15, 1993). Thus, if the NLRA is analogous to WARN for limitations purposes, just because a small fraction of all possible WARN employee-plaintiffs (not including respondents here) enjoy limited protection under the NLRA, then the tail would indeed be wagging the dog.

Petitioners attempt to rebut this point by asserting that the NLRA protects both represented and unrepresented employees. Crown, Cork Br. 19-21; North Star Br. 24-25. In fact, however, the vast bulk of the NLRA is concerned solely with the certification of union representatives for bargaining units and the supervision of the process of collective bargaining. In practical terms, only one aspect of the NLRA applies to union and non-union employees alike — the section 7 right to engage in "concerted activities . . . for mutual aid and protection," retaliation for which is a ULP

under section 8(a)(1). For this reason, it is not surprising that every one of the cases cited by petitioners for the proposition that the NLRA applies whether or not there is a union involves this particular ULP.

Significantly, petitioners do not contend that WARN bears any resemblance to section 8(a)(1)'s protection of concerted action, the only ULP that they cite as applying to union and non-union employees alike. Rather, they draw an analogy only with section 8(a)(5)'s duty to bargain **with the union**. Petitioners do not pretend that **this** ULP applies to nonunion employees, and we know of no precedent that so holds. Accordingly, our argument that the section 8(a)(5) ULP not only fails to resemble the WARN cause of action, but also applies to only a small fraction of all WARN plaintiffs, stands unrefuted.

The argument that this one limited parallel with the NLRA suffices to make the two statutes "closely analogous" for borrowing purposes is completely inconsistent with this Court's precedents. For example, in *Reed*, the Court acknowledged that one small class of suits under Title I of the LMRDA might directly implicate challenges to collective bargaining agreements, and thus closely resemble DFR actions; but that was not sufficient reason to extend the application of section 10(b) to actions under the LMRDA generally. 488 U.S. at 331-332 n.6. Similarly, when this Court decided *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), one small fraction of the claims that could be brought under 42 U.S.C. § 1983, and a larger fragment of claims under 42 U.S.C. § 1981, could be brought under Title VII of the Civil Rights Act of 1964. Yet that was no reason for this Court to borrow Title VII's 180-day limitations period to govern claims under these civil rights statutes. So, too, the fact that some WARN plaintiffs may have NLRA protection should not affect the selection of the limitations period.

There is another respect in which North Star's NLRA analogy is inconsistent with precedent: this Court has held

that a mere "family resemblance" between a federal statutory claim and some aspect of the NLRA is insufficient to warrant adoption of section 10(b). Rather, there is sufficient similarity between the NLRA and the federal claim **only** when the claim directly challenges the private resolution of a dispute between a union and an employer, and thus implicates the long-term bargaining relationship between the two. *Reed v. UTU*, 488 U.S. 319, 331 and n.6 (1989); *Doty v. Sewall*, 784 F.2d 1, 9, 10 (1st Cir. 1986).

As we more fully discuss below, that is surely not the case here. Not only does WARN apply regardless of whether there is a union involved, and regardless of whether the union and employer have tried to resolve any dispute about the plant closing, but any rights that even union members may enjoy under the NLRA are in addition to their WARN rights, as WARN expressly provides. 29 U.S.C. § 2105. Consequently, even if a union and employer reach an agreement about the closing, and employees nevertheless mount an attack on the employer's compliance with WARN, they are enforcing independent rights, not attacking the dispute resolution itself. *Cf. Barrentine v. Arkansas-Best Freight Lines*, 450 U.S. 728 (1981).

4. Different Relief. Not only the purposes, procedures, and cause of action, but also the relief available under the NLRA, is very different from WARN. If the NLRA is violated in connection with a plant closing or layoff, the NLRB may issue an order requiring the company to bargain with the union. *Stevens Pontiac-GMC*, 295 NLRB 599, 603 (1989). Employees who have been laid off may be entitled to reinstatement to their positions. *North Carolina Coastal Motor Lines*, 219 NLRB 1009, 1009-1010, 1015 (1975), *enf'd*, 542 F.2d 637, 638 (4th Cir. 1976). The NLRB may require the employer to offer the affected workers positions at other plants, *Royal Norton Mfg. Co.*, 189 NLRB 489, 489, 495 (1971), or even, in some cases, to reopen an operation pending the completion of the required bargaining with the union. *Florida-Texas Freight. Corp.*, 203 NLRB 509,

511 (1973), *enf'd mem.*, 489 F.2d 1275 (6th Cir. 1974). In theory, preliminary relief may be granted under section 10(j), ordering an employer not to close the plant in the first place. The employees are also awarded back pay, but not from the date of the closing; rather, a formula has been developed that is intended to encourage an employer to bargain in good faith once the Board has ruled, although interim earnings and various other sums may be deducted. *Transmarine Navig. Corp.*, 170 NLRB 389 (1968).

WARN relief is quite different. First, WARN expressly forbids injunctions against a plant closing or layoff, 29 U.S.C. § 2104(b), a bar which, *a fortiori*, prevents an order that a plant be reopened. There is no role for collective bargaining of WARN rights, and so that relief, as well as reinstatement to employment, is unavailable. The only relief for employees is an award of damages, which are calculated very differently than under the NLRA. Thus, although the employees' wages and benefits provide the measure of the damages for each day on which required notice was not given, 29 U.S.C. § 2104(a)(1), there are no offsets for unemployment compensation, wages from other employers, or payments otherwise owing to employees at the time of shutdown. 29 U.S.C. § 2104(a)(2); H.R. Conf. Rep. No. 100-576, 100th Cong., 2d Sess. 1053 (1988). The NLRB has unanimously distinguished WARN payments from the backpay obligations that an employer may owe under its *Transmarine* doctrine, precisely because the two kinds of payments have such different purposes under the statute. *Times Herald Printing Co.*, 315 NLRB No. 100, 147 LRRM 1281, 1283-1284 (1994). There is also authority that employees need not show on which days during the period of withheld notice they would in fact have worked, as the NLRA would require. *USWA v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993). *Contra, Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1286 (5th Cir. 1994).

C. The Six-Month Limitations Period Is Not Needed to Protect Federal Labor Policies, and Its Adoption Could Easily Frustrate WARN's Own Policies.

Petitioners' argument also fails because they cannot show that "the federal policies at stake and the practicalities of litigation make [section 10(b)] a **significantly more appropriate** vehicle." *DelCostello*, *supra*, 462 U.S. at 171-172 (emphasis added).

1. Section 10(b) Is Not Needed to Effectuate Federal Policies.

Petitioners invoke two federal policies which, they say, are imperiled unless a federal limitations period is borrowed. The first is the interest in avoiding the forum-shopping and needless litigation which, they assert, would necessarily result from borrowing state limitations periods. However, as Part II(A) of this brief explains, this argument, if accepted, would **always** forbid the borrowing of state limitations periods. Rather than distinguishing WARN from most other federal statutes, it emphasizes what most federal laws have in common — they apply to defendants that operate in many different states, each of which has its own limitations periods. The argument thus amounts to a request that the presumption in favor of state borrowing be overruled. *See infra* 43 to 46.

Petitioners also argue that borrowing state limitations periods would harm a supposed federal policy favoring prompt resolution of employment-related disputes. To the extent that this supposed policy applies to all federal labor statutes, it cannot support borrowing from federal law because it proves too much — it always requires borrowing section 10(b). *See* pages 19 to 22, *supra*.

But petitioners also err in asserting that Congress has generally imposed extremely short limitations periods in

labor cases. In this regard, their citation of the limitations periods for employment discrimination and federal employee claims scarcely exhausts the express limitations periods that Congress has enacted to govern claims by employees against their employers. Indeed, other federal employment statutes have substantially longer express limitations periods. For example, the Portal-to-Portal Pay Act, 29 U.S.C. § 255, provides a two-year limitations period for seeking unpaid wages under the Fair Labor Standards, Walsh-Healey, or Davis-Bacon Acts (or three years for willful violations). Similarly, the Railway Labor Act allows two years for suits to vacate NRAB awards, section 3, First (r), 45 U.S.C. § 153, First (r), and six years are allowed to sue fiduciaries under the Employee Retirement Income Security Act, 29 U.S.C. § 1113. Moreover, railroad and maritime workers are given three years to sue their employers over on-the-job injuries, 45 U.S.C. § 56; 46 U.S.C. § 688.

The one thing that all federal six-month limitations periods have in common is that they define the time in which an employee must file a charge with an agency, which the agency then investigates on the employee's behalf. The longer statutes set forth the time in which an employee must find a lawyer, do the necessary investigation to satisfy Rule 11, and file suit in court.[17]

Nor, indeed, do this Court's precedents support the proposition that six-month limitations periods are generally desirable for cases involving the rights of employees, or even generally for cases that may have an effect on the collective bargaining process. After all, it was not mere interference with collective bargaining in some general sense that motivat-

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[17] Similarly, almost every one of the short state limitations periods for employment discrimination claims cited in Crown, Cork's brief at 28 n.13, sets the time for filing a charge with a state agency, not for filing suit.

ed the Court in *DelCostello*, but rather the overturning of union-employer dispute resolutions:

> the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective-bargaining agreement affecting the entire relationship between company and union . . . This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as [three] years later.
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> 462 U.S. at 169, *quoting UPS v. Mitchell*, 451 U.S. 56, 63-64 (1981).

But, as shown in the previous section of this brief, WARN claims do not attack arbitral awards nor otherwise challenge union-employer agreements, and hence this rationale is inapplicable.

Petitioners also assert that WARN itself expresses a policy in favor of rapid enforcement, primarily in a provision that exempts employers from paying the $500 per day penalty to local government units if they make their WARN payments within three weeks of a plant closing. We certainly agree that it is better if employers meet their obligations promptly after failing to give notice, and we assume both that Congress wanted employers to do so and that, in most cases, employees will promptly sue as soon as it is clear that a WARN violation occurred.

But the statute of limitations does not determine the time within which employers will give notice of a plant closing; it only determines, once an employer has failed to meet its obligations in a timely manner, the amount of time its employees have to sue for redress. Once an employer has

failed to honor its obligations under WARN, there is nothing in the statute or in the underlying policies that favors the speedy resolution of disputes that is at all comparable to the need for industrial peace on which *DelCostello* relied. Indeed, an unduly short limitations period would make it far more difficult for employees, especially unrepresented employees who do not have a union with experienced officers and counsel looking out for their interests, to secure enforcement of the duties that WARN imposes on employers. The ultimate result will be less compliance with WARN, not more timely compliance.

Finally, petitioners contend that, because WARN may involve companies that are going out of business, there is a particular danger that records and witnesses may disappear if suit has not been brought within six months. However, the evidence that will be needed to defend a case will largely be records that are in the company's possession already, and it is not every company that closes a plant or lays off many employees that must keep records for WARN purposes — only those that fail to give notice at least sixty days beforehand must do so. Moreover, companies must still maintain their financial records at least for the limitations period of the tax laws and, probably, the securities laws, inasmuch as a company in financial difficulty causing plant closures may have exposure to suits under Rule 10b-5. And, as North Star concedes, federal wage and equal employment laws require employers to keep detailed payroll records for at least three years. Br. 32 n.15.

What is more, even if the NLRA's six-month limitations period were borrowed to govern claims by employees, it is inconceivable that the same period would be held most analogous to claims brought by local governments to collect the statutory $500 per day civil penalty. The claim may well be governed by the express five-year limitations period for civil penalties under 28 U.S.C. § 2462; it is also closely analogous to Pennsylvania's two-year limitations period for actions under a civil penalty statute. 42 Pa. Cons. Stat. Ann.

§ 5524(5). In either case, employers would have to retain their relevant records for well over six months, and thus petitioners' final argument fails to justify a six-month limitations period for WARN actions by employees.

2. Adoption of Section 10(b) Would Make It Difficult to Enforce WARN.

Far from being needed to effectuate federal policy, the use of section 10(b) would harm the policies underlying WARN, because a six-month limitations period is too short to permit many WARN claims to be brought. There are two reasons for such concern.

First, workers, unions and communities that consider bringing a WARN action must confront a number of issues. *See generally* McHugh, *Fair Warning or Foul? An Analysis of the [WARN] Act in Practice*, 14 Berkeley J. Emp. & Labor Law 1 (1993). If an entire plant has been permanently closed, their task is relatively simple: they must only ascertain the original number of employees, 29 U.S.C. §§ 2101(a)(1) and (2), with due regard for the number of hours worked by part-time employees, § 2101(a)(8). But if the plant continues in operation, potential plaintiffs also must assess the number and percentage of employees laid off over any thirty or ninety day period, 29 U.S.C. §§ 2101(a)(3), 2102(d), taking into account the number of employees who have been offered transfers to other locations. 29 U.S.C. § 2101(b). Even assuming that a union could use its rights under section 8(a)(5) of the NLRA to obtain such information soon enough to decide within six months whether a suit is warranted, unrepresented employees are unlikely to have any access to it. Moreover, WARN affords a variety of defenses related to considerations of reasonable business and legal judgment, as well as, in the case of partial closures, the employer's foresight about the likelihood of future layoffs at the time an initial layoff is imposed, as well as concerning

the likely duration of the initial layoff. *E.g.*, 29 U.S.C. §§ 2102(b), 2103(1).

Second, if the employer does not announce at the outset that the layoff or closing is permanent, prospective plaintiffs must make the judgment whether the layoff is likely to last more than six months. Moreover, workers who are hopeful that, if the plant does reopen, they will be among the group selected to go back to work, may be leery of suing their employer until they are sure that their jobs have, in fact, been eliminated. In this case, for example, North Star initially took the position that its layoff was indefinite, and hopefully temporary, and it steadfastly refused to clarify the matter despite repeated inquiries from respondent Thomas. Employees put in this position should not be required to be mind-readers in deciding whether to rush into court before the expiration of six months after the layoff began. The borrowing of section 10(b) would require the employees and their counsel to obtain the necessary information, make such calculations, and file a complaint in compliance with Rule 11 of the Federal Rules of Civil Procedure within a mere six months.

Petitioners make light of this issue, North Star Br. 29, arguing that a number of plaintiffs have been able to sue within six months, and that the only questions are whether there was a lay-off, when notice was given, and how many employees were involved. But there are also a large number of cases in which plaintiffs have not sued that soon, because, as we showed above, there are a number of questions that may not be as easy for individual employees to answer as it presumably is for sophisticated labor counsel retained by larger employers. Even petitioners' own briefs make clear that far more may be involved. For example, they are at pains to show that WARN courts have adopted NLRB standards, applied in election eligibility cases, for deciding whether particular employees have a reasonable expectation of recall and therefore are on only temporary layoff. North Star Br. 21, *citing Damron v. Rob Fork Mining Corp.*, 945

F.2d 121, 124 (6th Cir. 1991). As this case makes clear, that determination turns on a variety of criteria that themselves depend on data to which individual employees are not likely to have access. There is a real danger that adoption of a six-month limitations period within which workers would have to ascertain such information, find counsel, and file suit could cripple enforcement of WARN, which provides yet another reason why the judgment below should be affirmed.

* * *

In *DelCostello*, the Court was troubled that a limitations period of a few months might be too short a time to bring suit. However, impelled to choose between time periods even shorter than six months that would endanger the enforceability of the DFR, or lengthy periods that might seriously threaten federal labor policies favoring the finality of grievance settlements, it opted for section 10(b) because the analogy between the NLRA and the DFR was so close. 462 U.S. at 169. Here, by contrast, as we showed *supra* at 23 to 31, the analogy to the NLRA is tenuous at best, and as we showed *supra* at 32 to 36, federal labor policies will not be endangered by a limitations period measured in years rather than months, but adoption of a six-month period would endanger WARN's own policies. *Supra* 36 to 38. Accordingly, the "exceptional" case for borrowing federal rather than state law simply has not been made. Indeed, even if there were no strong presumption, the analogies and equities still favor borrowing from state law.

III. THIS ACTION WOULD BE TIMELY BASED ON ANY OF THE ANALOGOUS STATE OR FEDERAL LIMITATIONS PERIODS.

If the Court chooses to decide in this case what the proper state limitations period for WARN actions, despite the fact that petitioners deliberately did not present that question, just as they avoided that question below, the best choice among state limitations periods is the one chosen by a

number of federal courts for WARN — state law statutes governing actions on contract.[18] In Pennsylvania, this would allow four years if the contract is deemed either implied in law or based on an agreement not in writing. *See* 42 Pa. Cons. Stat. Ann. § 5525(3) or (4).

The reason for borrowing a contract limitations period is not that WARN arises from an actual agreement between the parties; petitioners are clearly correct that the duty is imposed by statute. Nevertheless, employees and employers have a contractual relationship, whether under a CBA governed by federal law or by the state's common law, and WARN imposes a additional duty on the parties' contractual relationship. *Cf. McDonald v. Thompson*, 184 U.S. 71, 74 (1902) (liability imposed on contractual relationship by federal law should be characterized as either implied contract or obligation imposed by statute).

Courts have sometimes borrowed contractual limitations periods to govern other federal statutes that govern a contractual relationship. *E.g.*, *Dantagnan v. ILA Local 1418*, 496 F.2d 400 (5th Cir. 1974). Moreover, the statutory remedy limits the employees to damages measured by the contractual wage rate, and excludes the sort of damages that are commonly available in tort, such as emotional or punitive damages.

Another possible choice is the three years allowed by 43 Pa. Stat. Ann. § 260.9a(g) for suing under the Pennsylvania Wage Payment and Collection Law ("WPCL"). Because employees' wage rates provide the measure of damages for claims under WARN, the WPCL provides a sound analogy to the WARN cause of action. The Third Circuit has previously adopted that limitations period for the enforcement

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[18] *Paperworkers Local 340 v. Specialty Paperboard*, 999 F.2d 51, 57 (2d Cir. 1993); *Frymire v. Ampex Corp.*, 821 F. Supp. 651, 655 (D. Colo. 1993); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 196-197 (E.D. Mich. 1993).

of claims for unpaid pension contributions under a CBA. *Connors v. Consolidation Coal Co.*, 866 F.2d 599, 603-604 (1989).

A third alternative is the six-year period allowed by the Pennsylvania residual statute of limitations, which applies "to any civil action or proceeding which is [not] subject to another limitation specified in this subchapter." 42 Pa. Cons. Stat. Ann. § 5527. Crown, Cork argues that *Agency Holding Corp.* bars the borrowing of such a limitations period, but given Congress' subsequent enactment of a four-year residual limitations period for federal statutes, it is hard to understand why there should be any presumption that Congress disfavors residual **state** limitations periods. Moreover, this Court has borrowed such statutes in other cases, *Corsicana Nat'l Bank v. Johnson*, 251 U.S. 68, 85-86 (1919), including, most recently, in *Owens v. Okure*, 488 U.S. 235 (1989). And the lower courts have continued to borrow residual limitations periods when other state analogies have been inappropriate. *E.g.*, *Teumer v. General Motors Corp.*, 34 F.3d 542, 548 (7th Cir. 1994); *SEIU v. City Cleaning Co.*, 982 F.2d 89, 95 (3d Cir. 1992) ("it encompasses any cause of action — either federal or state — for which a limitation has not been expressly created by the legislature or by Congress"). Thus, if no other state limitations period will do, the Court should borrow section 5527.

A final possible state analogy is with Pennsylvania's two-year limitations period for enforcing civil penalties. 42 Pa. Cons. Stat. Ann. § 5524(5). WARN damages operate, at least in part, as a civil penalty. This is especially true for communities, which are entitled to $500 per day regardless of the amount of wages involved; indeed, the most analogous limitations period for this cause of action is either the state or the federal limitations period for civil penalties. But the employees' cause of action also has an aspect of both deterrence and punishment of employers who fail to provide 60 days' notice of a shut-down. Thus, although WARN damages have a compensatory aspect, they are not entirely

compensatory, because Congress made a considered decision not to impose any duty to mitigate on employees, or to reduce their recovery according to whether and to what extent they sustained "actual damages" because they might not have worked on some of the sixty days in question, or because they actually found employment for part of the sixty days. Instead, the only way for employers to limit their exposure to WARN damages is through a demonstration of good faith, either in the commission of the violation itself, or the provision of unconditional and voluntary benefits to employees denied notice. 29 U.S.C. §§ 2104(a)(2) and (4). These factors are related more to deterrence than to compensation of employees for actual harm.

The fact that none of these possible limitations periods may provide a perfect analogy is not surprising, because states rarely enact their limitations periods with federal statutes in mind. As the Third Circuit said in explaining its decision to borrow the six-year residual limitations period in section 5527(6) to govern retaliation claims under section 510 of ERISA,

> the *DelCostello* Court emphasized that "federal courts should [not] eschew use of state limitations periods anytime state law fails to provide a **perfect** analogy." 462 U.S. at 171 (emphasis added). The Court recognized that "there is not always an obvious state-law choice for application to a given federal cause of action." *Id.* Nevertheless, the Court concluded that "resort to state law remains the norm for borrowing of limitations periods." *Id.* Thus, only if "a rule from elsewhere in federal law **clearly** provides a closer analogy," *id.* at 172 (emphasis added), may we "turn away from state law." *Id.*

Gavalik v. Continental Can Co., 812 F.2d 834, 847 (3d Cir. 1987) (emphasis in original; parallel citations deleted).

However, if the Court finds that none of the available state law analogies is adequate, there remain federal limitations periods that are far more appropriate for borrowing than section 10(b). The best alternative is section 6 of the Portal-to-Portal Pay Act, 29 U.S.C. § 255, that allows two years to seek unpaid wages under the Fair Labor Standards, Walsh-Healey, and Davis-Bacon Acts.

Like the WARN Act, the statutes governed by section 255 provide minimum labor standards, rather than being directed to the encouragement of collective bargaining. Like WARN, the FLSA and other statutes provide almost exclusively for monetary relief (the FLSA does prohibit retaliation against employees who enforce their FLSA rights, but that aspect of the statute is clearly ancillary to the main subject of the law). Like WARN, the overtime provisions of the FLSA impose monetary obligations measured by whatever wage rates are agreed between the employer and its employees (*i.e.*, 150% of the wage rate for the first 40 hours worked in each week), even though the statute requires payments that are excused by the contractual relationship itself. Like WARN, section 255 provides reduced financial exposure — a two-year limitations period, rather than three years — for employers whose mental state is less culpable. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1986). As in *Agency Holding Corp.*, where similarities in the remedial structure of RICO and the antitrust laws provided a reason to borrow the Clayton Act's limitation period to govern RICO, these remedial similarities support borrowing section 6 to govern WARN, if any federal limitations period is borrowed.

Perhaps most important, section 6, like WARN, was designed as an appropriate time for employees to find a lawyer and file a complaint in federal court, not just to file a simple charge form with a federal agency whose employees

are charged with helping employees and investigating their charges for them. Although this Court found it appropriate in *DelCostello* to borrow section 10(b) where there was no other federal law alternative, and where its six-month period actually represented a longer time than the existing state law analogue, that does not make section 10(b) the best choice when other state and federal limitations periods are available.

IV. THE COURT SHOULD NOT REVERSE 165 YEARS OF PRECEDENT BY CREATING A PRESUMPTION IN FAVOR OF BORROWING FEDERAL LAW.

Presumably because it recognizes that the case cannot be made for borrowing section 10(b) under prevailing standards, petitioner North Star asks the Court to overturn those precedents. It asserts that Congress has expressed its desire to abandon state law borrowing, and that such borrowing both foments litigation over possible state limitations periods, and creates uncertainty among potential litigants who may be sued in different forums. However, "[t]ime and again this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law,'" *Hilton v. South Carolina Pub. Ry. Comm.*, 502 U.S. 197, 202 (1991), which has "special force in the area of statutory interpretation," *id.*, Neither of petitioner's arguments provides the "compelling justification" that is needed to reverse such longstanding precedent. *Id.*

We acknowledge that a presumption in favor of borrowing from federal law does have the advantage of creating uniform limitations periods for suits filed in every state under any given federal statute. On the other hand, because many federal claims have state law analogues, a given litigant may have parallel claims under both state and federal law, and it is desirable for both sets of claims to expire at the same time. Under North Star's proposal, that result would not occur, thereby causing a problem of

increased significance given Congress recent enactment of the supplemental jurisdiction provisions of 28 U.S.C. § 1367. Even if North Star's arguments might have force if the Court were writing on a clean slate, that is not the situation.

Thus, when WARN was enacted in 1988, the Court had held for almost 160 years that borrowing from state law is the rule, and choosing a federal limitations period the very narrow exception. The Court had also said, as recently as 1987, that it was fair to assume that Congress intended by its silence to have the Court borrow from state law. *Agency Holding Corp. v. Malley-Duff Assoc.*, 483 U.S. at 147. Against this background, it is fair to assume that Congress intended the limitation period for WARN to be developed according to the same standard.

Nor is there any merit in North Star's argument that Congress' intent in enacting a four-year residual limitations period for statutes taking effect after 1990, 28 U.S.C. § 1658, frees the Court to rewrite 165 years of precedent and apply a six-month limitations period to WARN. North Star relies on an analysis that was placed in the Congressional Record by Senator Grassley, 136 Cong. Rec. 17581 (1990), which explained that, under existing doctrine, "federal courts 'borrow' the most analogous state law limitations period"; according to the analysis, this rule has the disadvantage of obligating courts to determine the applicable period, producing disagreements among the federal courts, and leaving litigants uncertain until consensus is reached. This excerpt not only shows Congress' belief that it was **state law** periods that were being borrowed, but Congress' failure to alter this approval shows that it recognized and was willing to accept the fact that it is state law that is being borrowed. It is the very need to borrow that Congress wanted to fix, and then only for newly created causes of action.

In this regard, there is a great irony in North Star's proposal that the Court rewrite precedent based on the intent underlying 28 U.S.C. § 1658. Normally, courts consider legislative history in trying to construe the statute that was

being discussed, although there is controversy within the Court about the extent to which such materials should be considered. But North Star has no interest in having section 1658's four-year limitations period applied to WARN.

Even more important, North Star ignores the reason why Congress decided not to apply the law that was the product of this analysis to existing statutes. According to the House Report No. 101-734, the limitations periods for many statutes had already been resolved by the Courts, and imposing a new limitations period for all these laws "would threaten to disrupt the settled expectations of a great many parties." 1990 U.S. Code Cong. & Admin. News 6870. If this Court overturned the many years of precedent on which lower courts and parties have relied in reaching the general consensus that prevails with respect to the limitations periods for most federal statutes, the result would be to produce the very disruption that Congress sought to avoid.

To be sure, there are some federal causes of action — WARN among them — on which this Court has not pronounced judgment and for which no consensus has yet emerged among the lower courts. But the minor benefits that would allegedly be produced in reducing the amount of limitations litigation under those statutes by the adoption of a federal borrowing presumption is far outweighed by the strife that would be caused under the great majority of pre-1991 laws whose limitations periods are now generally accepted.

Indeed, if section 1658 is relevant at all, it shows that the speedy resolution of controversies on which petitioners seek to rely was obviously much less significant than they have suggested, and that Congress is not disturbed by the application of a limitations period four years in length. 28 U.S.C. § 1658. Although this statute applies only to laws enacted without an express statute of limitations after December 1, 1990, it has been argued that this four-year period may be borrowed by analogy. Siegel, *Practice Commentary*, United States Code Annotated, Title 28, Judiciary

and Judicial Procedure, §§ 1653 to 1960 at 243 (1994). Indeed, if petitioner North Star is serious in urging the enactment of section 1658 as a reason to apply federal law, then it surely makes sense to adopt the four-year limitations period adopted by Congress in section 1658 in choosing among federal law alternatives.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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